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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1158

LOUISVILLE CHAIR COMPANY, INC., - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD and UNITED FURNITURE WORKERS OF AMERICA, LOCAL #236, AFL-CIO, - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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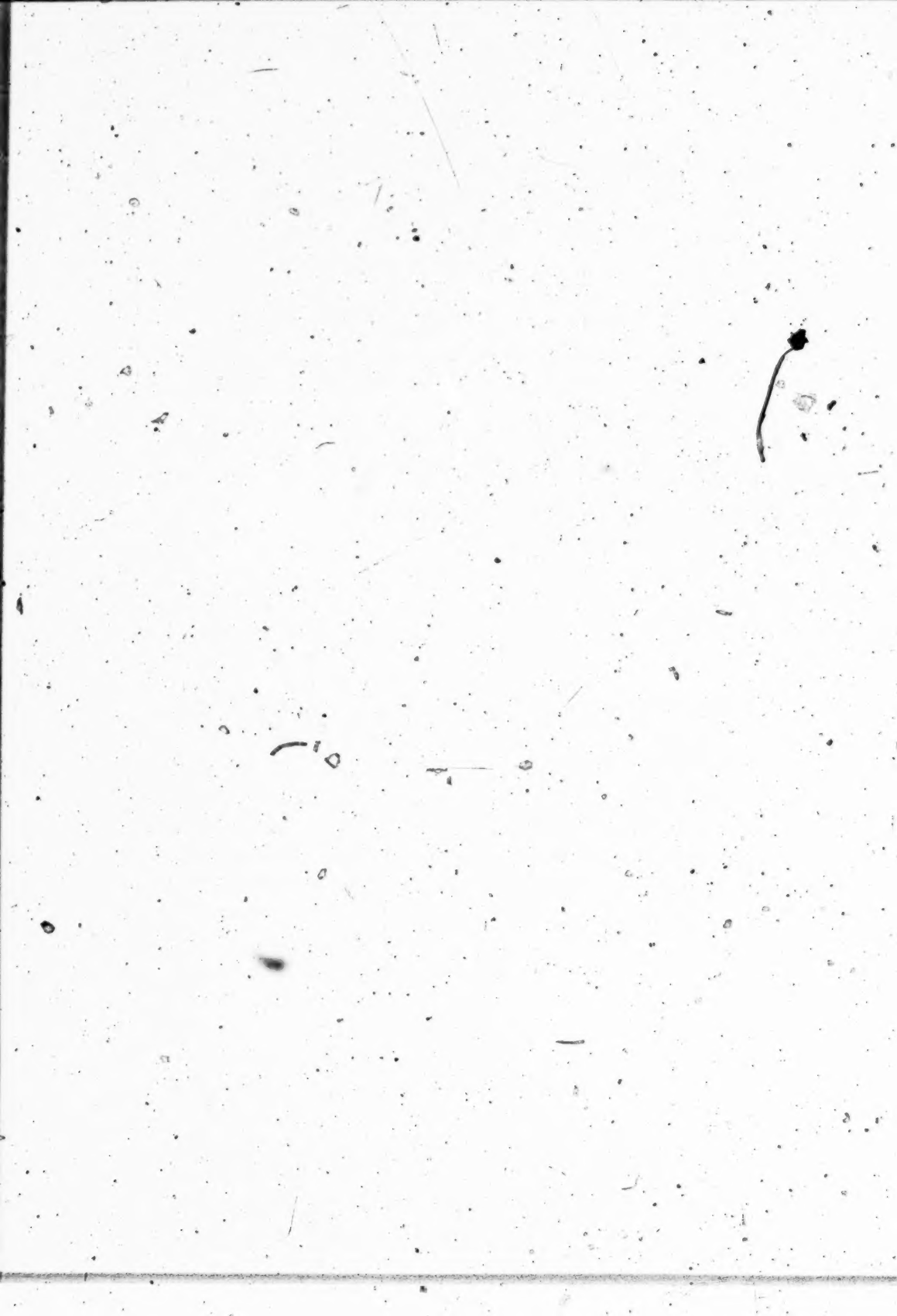

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

LOUISVILLE CHAIR COMPANY, INC., - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and UNITED FURNITURE WORKERS OF AMERICA; LOCAL #236, AFL-CIO, - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Louisville Chair Company, Inc. (hereafter called "the company"), by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in the above-captioned case on December 1, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals is reproduced in Appendix A hereto (pages 1a-12a) and is reported at 385 F. 2d 922 (1967). The decisions and orders of the trial examiner and the National Labor

Relations Board in this case (which were enforced by the Court of Appeals) are reproduced in Appendix B hereto (pages 13a-69a) and are reported at 161 NLRB No. 31 (1965).

JURISDICTION.

The aforesaid judgment of the Court of Appeals was entered on December 1, 1967 (Appendix A, page 1a). The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(e).

QUESTIONS PRESENTED.

1. Whether it was erroneous, improper and a denial of procedural due process for the National Labor Relations Board (hereafter called "the Board") and the Court of Appeals to deny Louisville Chair Company, Inc., a hearing, at some stage of the proceedings in this case or in the related representation case, on the Company's objections to the union representation election held by the Board on May 27, 1965, in a unit composed of the Company's production and maintenance employees, those objections being on the ground of substantial and material misrepresentations about the Company's profits knowingly made by the Furniture Workers Union to the employees prior to that election, at a time when the Company did not have an opportunity to make an effective reply, and also on the ground of irregularities in the conduct and results of the election, as evidenced by the admitted fact that

there were more ballots in the ballot box than there were voters.

2. Whether the Furniture Workers' strike of the Company's production and maintenance employees which began on August 17, 1965 was an unfair labor practice strike in protest of the Company's refusal to bargain with the Furniture Workers Union, or whether the Furniture Workers' strike was an economic sympathy strike in support of a strike of the Company's truck drivers in a separate bargaining unit which was previously begun against the Company by Teamsters Local Union No. 89, where the undisputed evidence showed and the Board found that despite the Company's refusal over a period of several months to recognize and bargain with the Furniture Workers Union, the immediate precipitating cause of the Furniture Workers' strike was the Teamsters' strike in the bargaining unit of truck drivers.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Constitution of the United States, the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. §§151, *et seq.*), the Statements of Procedure of the National Labor Relations Board—Series 8, as amended (29 C. F. R. §§101.1, *et seq.*), and the Rules and Regulations of the National Labor Relations Board—Series 8, as amended (29 C. F. R. §§102.1, *et seq.*) are set forth in Appendix C hereto (pages 71a-79a).

STATEMENT.

The facts in this case are substantially set out in the opinion of the court below, which reiterated the findings of the Board and its trial examiner. However, we believe it would be in order to very briefly review those facts here for the benefit of the Court.

This case arises from a representation election held by the Board on May 27, 1965 in a unit composed of the Company's production and maintenance employees, to which election the Company filed timely objections with respect to conduct affecting the results of the election and to the conduct of the election. This election was ostensibly won by the Union by a vote of 187 to 112 (J. A. 441a-442a.)[1] The Company also filed a timely request for a hearing on its objections to the election (J. A. 530a-531a).

These objections were overruled by the Board's Ninth Regional Director on the basis of an *ex parte* investigation, he denied the Company's request for a hearing on the objections, and he also certified the Union as the collective bargaining representative of the voting unit employees on the basis of the contested election (J. A. 443a-447a). The Board sustained the Regional Director by peremptory telegraphic orders (J. A. 484a, 491a).

In order to contest the findings in the representation case, and the resulting certification of the Union, the Company refused to bargain with the Union (J. A. 43a-44a). This resulted in unfair labor practice charges

[1] "J.A." refers to the Joint Appendix of the Board and the Company in the court below.

being filed against the Company, which were litigated before a trial examiner of the Board, the Board itself and the court below (J. A. 4a-60a, and Appendix A hereto).

On August 17, 1965, while the Company's objections to the election were still pending before the Board, the Union called a strike of the Company's employees whom it purportedly represented (J. A. 47a-51a). As the trial examiner found (and his findings were adopted by the Board), the strike by the Furniture Workers Union was called and began *after* Local 89 of the Teamsters Union commenced a strike by the Company's truck drivers (whom it represented), the Furniture Workers had been coordinating their efforts with those of the Teamsters, and the Furniture Workers' National Organizational Coordinator Silverman informed the Company's counsel on the morning of August 17, 1965, before the strike began, that the Furniture Workers would strike because of the Teamsters' strike in order to help the Teamsters and would "respect the Teamster picket lines" (J. A. 48a-51a).

On the basis of the record before him, the trial examiner concluded as follows with respect to the cause of the Furniture Workers' strike:

> "It is evident from the above that the timing of the strike was influenced and probably determined by the breakdown in the negotiations between Respondent and the Teamsters. It may well have been that but for the Teamsters' strike, the Union would not have struck at least until after the Board had acted upon Respondent's appeal

from the certification. To that extent the Teamsters' strike was certainly a cause of the Union's strike . . ." (J. A. 52a).

However, the trial examiner went on to hold that another cause of the strike was to protest the Company's refusal to bargain with the Union. Since the trial examiner also found that the election was valid and that the Union was properly certified, he held that the Company's refusal to bargain with the Union was unlawful and thus the strike was an unfair labor practice strike (J. A. 52a-53a).

The grounds for the Company's objections to conduct affecting the results of the election were that the Union made material and substantial misrepresentations in handbills distributed to the Company's employees before the election at a time when the Company could not make an effective answer to those statements. The deceptive and misleading statements were made in two handbills which were disseminated shortly before the election (J.A. 443a-444a).

The first handbill concluded as follows:

> "So let the speeches come—Let the Company's lies and propaganda flow. When the time comes—Join the majority of Louisville Chair workers and vote YES. The Company's gross profit for the last fiscal year was—$1,730,111.00—VOTE YES. Lets get our share of the pie!!" (J. A. 448a).

The second handbill concluded in an even stronger vein, to-wit:

"TAKE A GOOD LONG LOOK AT WHAT THESE UNION WORKERS ARE MAKING.

"THEN TAKE ANOTHER LONG LOOK AT YOUR LAST PAY-CHECK STUB.

"TAKE ANOTHER LOOK AT THE LOUISVILLE CHAIR COMPANY'S GROSS PROFIT FOR THE FISCAL YEAR ENDING JUNE 30, 1964—$1,730,111.00!" (J. A. 449a-450a).

Both of these handbills were prepared by the Union at a time when it most certainly knew (according to the Company's proffered but rejected evidence on this point, which has never been denied) that the Company's *net income* for the fiscal year ended June 30, 1964 was only $244,198.00 and that the *gross profit* was subject to deductions of $1,210,487.00 for expenses and $278,145.00 for Federal income taxes before Respondent's net income could be determined (J. A. 241a, 307a, 536a-537a, 541a).

Furthermore, as the Company's proffered and uncontradicted but rejected evidence shows, the eligible voters did not understand the technical accounting term "gross profit" as used in the handbills and would have been misled and deceived into thinking that the Company had a $1,730,111.00 profit for its last preceding fiscal year which was available to be paid to them in the form of wage increases, as promised to them by the Union (J. A. 303a-304a, 311a, 546a-547a).

The basis for the Company's objections to the conduct of the election was the "apparent" fact, as found by the Regional Director in Case No. 9-RC-6223, "that there were two more ballots cast than is indicated by

the check marks on the eligibility list" which was used by the Company and Union observers in registering the voters in the election (J. A. 445a).

The Company's proffered but rejected testimony on this question was that the observers for both the Company and the Union at the May 27, 1965, election "exercised the utmost care to check off the eligibility list the name of each and every voter to whom a ballot was given by the Board agent", that it "is absolutely certain beyond any doubt whatsoever that no eligible voter was given a ballot . . . without the voter having his or her name checked off the eligibility list by both" observers, that the two observers and the Board agent who supervised the election agreed there were seven names on the list which had not been checked off, that Company and Union representatives agreed there were 307 names on the list, and that there were two more ballots in the ballot box than there were actual voters in the election (J. A. 299a-301a, 532a-533a).

The Board and its agents have consistently refused the Company's requests for the names of the seven people who were not checked off the elgibility list and refused to let the Company copy those names off the list (J. A. 300a, 555a-556a).

The Company only knows that in the course of investigating its objections to the election, *ex parte,* a Board agent requested the home addresses of four people named on the list (J. A. 556a). Two of those four people were among the five people in the unit who were not present on the Company's premises and did not vote on the day of the election, one having quit be-

fore the election and the other having been on a medical leave of absence for more than a month (J. A. 553a-554a). The only other result of the Board's investigation or evidence submitted to the Board in the course of the investigation which the Company has been able to discover is that one of the seven unnamed employees whose names were not checked off the eligibility list allegedly claimed to have voted in the election (J. A. 556a).

Aside from this, the Board has effectively prevented the Company from investigating the reason for the discrepancy between the number of ballots and the number of voters, and the Board has also refused to disclose to the Company the results of or the facts found from the Board's investigation of this situation (J. A. 555a-557a).

The Board's Ninth Regional Director, the trial examiner and the Board (by adopting the decisions of its Regional Director and the trial examiner in this respect) held that the Company was not entitled to a hearing on its objections to the election because in their view those objections did not raise substantial and material factual issues (J. A. 4a-7a, 44a-46a, 445a-446a, 484a, 491a). The trial examiner excluded all evidence in support of the objections which the Company sought to introduce at the hearing before him in the unfair labor practice case (J. A. 44a).

Subsequent to the Board's decision in the unfair labor practice case, it petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of that order pursuant to the National Labor Re-

lations Act, as amended (61 Stat. 136, 29 U. S. C. §§151 *et seq.*, as amended by 72 Stat. 519). The Furniture Workers Union was permitted to intervene in the enforcement proceedings. After filing of briefs and oral argument by the Board, the Company and the Union, the court below granted the Board's petition by its decision of December 1, 1967.

REASONS FOR GRANTING THE WRIT.

The decision in this case by the Sixth Circuit Court of Appeals merits review by the Supreme Court within the standards set by Rule 19 of the Rules of the Supreme Court of the United States because that decision is in conflict with decisions of other courts of appeal with respect to the Company's right to a hearing on its objections to the election and the nature of the strike, the Supreme Court has not settled these important questions of federal law, and the decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. *The Company's right to a hearing.* The Company's primary argument is that it was entitled to a hearing at some stage of the representation case or the unfair labor practice case on its objections to the election, inasmuch as those objections did raise substantial and material factual issues. The court below summarily disposed of this issue by merely saying that the Company only questioned " 'the interpretation and inferences placed upon the facts by the Regional Direc-

tor' ", but did not " 'clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing' " or " 'state the specific findings that are controverted and . . . show what evidence will be presented to support a contrary finding or conclusion' " (Appendix A, page 10a).

Actually, the reverse is true. The record in this case establishes beyond question or doubt that the Company has clearly endeavored at every stage of these proceedings to state and show that it was controverting the Board's findings as to the Union's misrepresentations and the irregularity in the conduct of the election. The Company has not only shown what evidence it would present to support a contrary finding or conclusion, but also submitted affidavits and, at the unfair labor practice case hearing, unsuccessfully sought to elicit testimony in support of its objections to the election from its own witnesses, the Union's chief representative in this case, and the appropriate officers and agents of the Board. *The only reason this testimony is absent from the record is the persistent refusal of the trial examiner and the Board to admit it.* The Company subpoenaed the officers and agents of the Board who had made the *ex parte* investigation of the Company's objections and who had knowledge of the facts with regard to the election, to appear at the hearing in the unfair labor practice case, but the trial examiner and the Board quashed those subpoenas on motion of counsel for the Board's General Counsel (J. A. 263a-265a, 599a).

The Board itself has effectively prevented the Company throughout every step and every stage of both the representation case and the unfair labor practice case from investigating and bringing to light the facts with regard to the Union's misrepresentations to the employees and the disparity between the number of ballots and the number of voters. Thus, if the Company did not " 'clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing' " (as the court below found, but which the Company vigorously denies), *that was due solely to the suppression of evidence by the Board and the Board's deliberate failure to disclose any facts which would support the Company's objections to the election or which would detract from the Board's findings and conclusions.* This in itself was improper and cause to set aside the Union's certification and dismiss the unfair labor practice case. Compare *Giles* v. *Maryland,* 386 U. S. 66 (1967).

Moreover, the Company did meet the standards required by the Board in order to justify its request for a hearing on its objections to the election.

In this connection, we call the Court's attention to the erroneous reliance placed by the court below on "Section 102.69(e)(1), 29 C. F. R." of the Board's rules and regulations. That section pertains only to "a case involving a consent election held pursuant to Section 102.62(b)", *but not to a contested representation case such as Case No. 9-RC-6223 involving the Company was.* Thus, in dismissing the Company's

claim of a right to a hearing, the court below cited and relied upon inapplicable authority.

The section of the Board's Rules and Regulations which is pertinent to the Company's representation case is at 29 C. F. R. §102.69(c). This section applies if an "election has been conducted pursuant to a direction of election issued following any proceeding under Section 102.67", which was the situation in the case at bar (J. A. 412a-416a, 441a-442a). This section at the time the representation case was pending went on to provide that "if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing", the regional director could only rule on objections to an election "on the basis of a hearing".

We submit that the Company met these requirements more than adequately.

First, the Company offered proof of a material and deceptive misrepresentation by the Union to the Company's employees, namely, talking about getting their "share of the pie" composed of the Company's "gross profit", at a time when the Union knew this was a distortion of the Company's financial condition and when the Company could not effectively answer it because of the proximity of the election date and the low level of education of those employees. Thus, this evidence raised the "substantial and material factual issues" of whether in fact the Union made this misrepresentation knowingly and whether the Union did so with the deliberate intent that it would have an impact on the employees, inflame them against the Company and

affect their vote because of their lack of education and the Company's inability to effectively reply.

In this connection, we call this Court's attention to the very recent decision of the Fourth Circuit Court of Appeals in *Schneider Mills, Inc.* v. *N. L. R. B.*, —— F. 2d ——, 57 CCH Lab. Cas. ¶12,458 (4th Cir., decided January 8, 1968). This case is virtually identical in principle to the case at bar. There, a union apparently won an election by a vote of 211 to 154. However, it passed out handbills two weeks before the election and also three days before the election, with a third handbill on the evening before and the day of the election. These handbills contained various misrepsentations and inflammatory statements about the employer, which the employer attempted to rebut in its own handbill distributed the day before the election. The Fourth Circuit overruled the Board's certification of the union because of the handbills immediately before the election, stating:

> "To the extent that previously made misrepresentations were repeated, we think that their vitiating effect on the validity of the election can be obviated only if the company had a second opportunity to make an *effective* reply . . . . Such a rule, we think, was prescribed by the Board in *The Gummed Products Company, supra,* at 1094, and the Board abused its discretion by not applying it in this case" (Our emphasis).

Similar misrepresentations have often been held to be cause for setting aside elections held by the Board.

N. L. R. B. v. *Trinity Steel Company,* 214 F. 2d 120 (5th Cir., 1954); *Celanese Corporation of America* v. *N. L. R. B.,* 279 F. 2d 204 (7th Cir., 1960), *rem.* 365 U. S. 297, *aff'd.* 291 F. 2d 224 (7th Cir., 1961), *cert. den.* 368 U. S. 925; *N. L. R. B.* v. *Houston Chronicle Publishing Company,* 300 F. 2d 273 (5th Cir., 1962); *N. L. R. B.* v. *Trancoa Chemical Corporation,* 303 F. 2d 456 (1st Cir., 1962); and *N. L. R. B.* v. *Bata Shoe Company, Inc.,* 377 F. 2d 821 (4th Cir., 1967). Similar decisions have been rendered by the court below, *Cross Company* v. *N. L. R. B.,* 286 F. 2d 799, *reh. den.* 288 F. 2d 188 (6th Cir., 1961), and by the Board itself, *Hollywood Ceramics Co.,* 140 NLRB 221 (1962).

Furthermore, the Company offered evidence that there were two more ballots in the ballot box than actual voters. This fact by itself and on its face (in addition to the Board's suppression and concealment of the results of its investigation, including the Board's admitted destruction of the ballots, J. A. 501a-502a) raised the "substantial and material factual issues" of whether the election was properly conducted and whether there had been some sort of vote fraud so as to invalidate the election.

Conduct and situations far less grave in nature than these have often led the Board and the courts to set aside elections. See *N. L. R. B.* v. *Bata Shoe Company, supra; Bullard Company* v. *N. L. R. B.,* 253 F. Supp. 391 (D. D. C., 1966); and *Athbro Precision Engineering Corporation,* 166 NLRB No. 116 (1967), set aside *sub. nom. International Union of Electrical*

Workers v. *N. L. R. B.*, —— F. Supp. ——, 57 CCH Lab. Cas. ¶12,440 (1968).

The integrity of the Board's election processes requires a hearing when under the facts and circumstances the petitioner raises a substantial and material question concerning the reason why there were more ballots cast than accounted for. It should make no difference that the number of ballots involved were not decisive as to the outcome of the election, for it is not the arithmetical count that is in question, but it is the integrity of the election process itself that is on trial where any taint of misconduct permeates the entire process. Whether the basis of the apparent irregularity could ever be cleared up or not, at the least the parties are entitled to the safeguards of a hearing on the issue.

Under circumstances such as those in the instant case, and by the great weight of authority, the Company was entitled to a hearing on its objections to the election. *N. L. R. B.* v. *Indiana & Michigan Electric Company*, 319 U. S. 9 (1943); *N. L. R. B.* v. *Bata Shoe Company, supra; N. L. R. B.* v. *Capital Bakers, Inc.*, 351 F. 2d 45 (3rd Cir., 1965); *N. L. R. B.* v. *Poinsett Lumber and Manufacturing Company*, 221 F. 2d 121 (4th Cir., 1955); *N. L. R. B.* v. *KVP Sutherland Paper Company*, 356 F. 2d 671 (1966); *Firestone Synthetic Fibers Company* v. *N. L. R. B.*, 374 F. 2d 211 (4th Cir., 1967); *General Engineering, Inc.* v. *N. L. R. B.*, 341 F. 2d 367 (9th Cir., 1965).

The court below erroneously relied upon its prior opinion in *N. L. R. B.* v. *Tennessee Packers, Inc.*, 379

F. 2d 172 (6th Cir., 1967), in denying the Company's contention that it was entitled to a hearing. In *Tennessee Packers,* the employer did not offer any evidence in support of its objections nor was it clear what the basis for the objections was nor did the employer request a hearing on its exceptions to the Regional Director's findings. Obviously, none of those conditions exist in the case at bar, and thus *Tennessee Packers* is distinguishable and inapplicable. Again, as with respect to the applicable Board rule, the court below erred with prejudice to the Company in denying it the right to a hearing.

Under the facts and circumstances in this case, and under all applicable authority, we respectfully submit that the Company was entitled to a hearing on its objections, that the denial of a hearing constituted a denial of procedural due process, and consequently the Union was improperly certified by the Board and it was not unlawful for the Company to refuse to bargain with the Union.

2. *The nature of the strike.* As the court below correctly stated in Footnote 3 to its decision, 385 F. 2d 922, 928, "sympathy strikers are only entitled to the same statutory protection as the economic strikers whom they support", and "if the instant strike was merely a sympathy strike, the Respondent would not be required to reinstate the strikers as ordered by the Board." We earnestly submit that the facts in this case clearly demonstrate that the strike by the Furniture Workers Union was merely one in sympathy with and support of the strike previously begun by the

Teamsters Union. *Cf., Crown Coach Corporation,* 155 NLRB 625 (1965), and *Filler Products, Inc.,* v. *N.L.R.B.,* 376 F. 2d 369 (4th Cir., 1967).

Although the Regional Director initially certified the Furniture Workers Union on July 16, 1965 (J. A. 447a) and on July 19, 1965, the Union requested negotiations with the Company (which was refused by the Company, J. A. 492a-493a, 505a-506a), the Union did not strike until August 17, 1965. Moreover, this was after the Company had been assured by representatives of the Union that it would not strike until the Company's pending objections to the election had been resolved by the Board (J. A. 49a-50a). This was, however, also after the Teamsters Union began its strike, was pursuant to the coordination of efforts between the two unions, and was after the Company's counsel had been informed by the Furniture Workers Union that they would help the Teamsters in every way they could and that the Company's employees had voted to strike in the event the Teamsters went on strike (J. A. 48a-51a).

Obviously, the contention by the Furniture Workers Union that it went on strike because of the Company's refusal to bargain with it is merely a self-serving second thought to try to bolster its position.

Moreover, even if the Furniture Workers Union called the strike because of the Company's refusal to bargain with it, that strike could not be and was not an unfair labor practice strike, because the Company was legally justified in refusing to bargain with the improperly certified Furniture Workers Union for the reasons mentioned above.

CONCLUSION.

We respectfully submit it is clear from the foregoing that the decision of the court below with respect to the Company's right to a hearing and the nature of the strike was prejudicially erroneous. We further submit that this decision is in conflict with decisions of other courts of appeal, this Court has not settled the important questions of federal law here presented, and the decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We therefore earnestly request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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